

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DARCY LISAMARIE LOCKARD,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

Case No. 3:11-cv-06050-BHS-KLS

REPORT AND RECOMMENDATION

Noted for August 31, 2012

Plaintiff has brought this matter for judicial review of defendant's denial of her applications for disability insurance and supplemental security income ("SSI") benefits. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the parties' briefs and the remaining record, the undersigned submits the following Report and Recommendation for the Court's review, recommending that for the reasons set forth below, defendant's decision to deny benefits should be affirmed.

FACTUAL AND PROCEDURAL HISTORY

On October 1, 2008, plaintiff filed an application for disability insurance benefits, and on October 10, 2008, she filed another one for SSI benefits, alleging in each application she became disabled as of September 30, 2008, due to speech and hearing problems, blindness in her left eye,

1 heart problems, degenerative disc disease, and depression. See Administrative Record (“AR”)
2 10, 117, 124, 150. Both applications were denied upon initial administrative review on March
3 17, 2009, and on reconsideration on June 29, 2009. See AR 10. A hearing was held before an
4 administrative law judge (“ALJ”) on January 4, 2010, at which plaintiff, represented by counsel,
5 appeared and testified, as did a vocational expert. See AR 25-54.

6
7 On January 27, 2010, the ALJ issued a decision in which plaintiff was determined to be
8 not disabled. See AR 10-20. Plaintiff’s request for review of the ALJ’s decision was denied by
9 the Appeals Council on October 28, 2011, making the ALJ’s decision defendant’s final decision.
10 See AR 1; see also 20 C.F.R. § 404.981, § 416.1481. On December 23, 2011, plaintiff filed a
11 complaint in this Court seeking judicial review of the ALJ’s decision. See ECF #1. The
12 administrative record was filed with the Court on March 6, 2012. See ECF #9. The parties have
13 completed their briefing, and thus this matter is now ripe for the Court’s review.

14
15 Plaintiff argues that defendant’s decision should be reversed and that this matter should
16 be remanded for an award of benefits, or in the alternative for further administrative proceedings,
17 because the ALJ erred in evaluating the opinions of James Parker, M.D., and Thomas Clifford,
18 Ph.D. For the reasons set forth below, however, the undersigned disagrees that the ALJ erred in
19 evaluating the opinions of these two medical sources and thus in determining plaintiff to be not
20 disabled, and therefore recommends that defendant’s decision be affirmed.

21 DISCUSSION

22
23 This Court must uphold defendant’s determination that plaintiff is not disabled if the
24 proper legal standards were applied and there is substantial evidence in the record as a whole to
25 support the determination. See Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986).
26 Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to

1 support a conclusion. See Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767
2 F.2d 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a preponderance. See
3 Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v. Sullivan, 772 F.
4 Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than one rational
5 interpretation, the Court must uphold defendant's decision. See Allen v. Heckler, 749 F.2d 577,
6 579 (9th Cir. 1984).

7
8 Defendant employs a five-step "sequential evaluation process" to determine whether a
9 claimant is disabled. See 20 C.F.R. § 404.1520, § 416.920. If the claimant is found disabled or
10 not disabled at any particular step thereof, the disability determination is made at that step, and
11 the sequential evaluation process ends. See id. If a disability determination "cannot be made on
12 the basis of medical factors alone at step three of that process," the ALJ must identify the
13 claimant's "functional limitations and restrictions" and assess his or her "remaining capacities
14 for work-related activities." Social Security Ruling ("SSR") 96-8p, 1996 WL 374184 *2. A
15 claimant's residual functional capacity ("RFC") assessment is used at step four to determine
16 whether he or she can do his or her past relevant work, and at step five to determine whether he
17 or she can do other work. See id.

18
19 Residual functional capacity thus is what the claimant "can still do despite his or her
20 limitations." Id. It is the maximum amount of work the claimant is able to perform based on all
21 of the relevant evidence in the record. See id. However, an inability to work must result from the
22 claimant's "physical or mental impairment(s)." Id. Thus, the ALJ must consider only those
23 limitations and restrictions "attributable to medically determinable impairments." Id. In
24 assessing a claimant's RFC, the ALJ also is required to discuss why the claimant's "symptom-
25 related functional limitations and restrictions can or cannot reasonably be accepted as consistent
26

1 with the medical or other evidence.” Id. at *7.

2 The ALJ in this case assessed plaintiff with the following mental residual functional
3 capacity:

4 **... The claimant is ... limited to performing simple, repetitive tasks with**
5 **only occasional interaction with co-workers and supervisors, and no**
6 **interpersonal contact with members of the general public. Lastly, the**
7 **claimant is limited to low stress jobs which are defined as jobs that do not**
8 **involve strict production quotas, more than occasional adaptation to**
changes in the workplace, or the exercise of discretionary decision-
making authority.

9 AR 16 (emphasis in original). In assessing plaintiff with the above RFC, the ALJ found in
10 relevant part as follows:

11 The claimant has ... a history of some anxiety and depression. Effexor has
12 been prescribed for the claimant and appears to have been reasonably
13 affective in controlling the claimant’s moderate level [of] psychological
14 symptoms. She is not currently seeing a counselor and is not under the care of
15 a psychiatrist or psychologist. Nevertheless, significant mental limitations
16 have been imposed in this case restricting the claimant to simple, repetitive
17 tasks with only occasional interaction with co-workers and supervisors, and
18 no interpersonal contact with members of the general public. The claimant
19 has likewise been limited to performing low stress jobs which are defined as
20 jobs that do not involve strict production quotas, more than occasional
21 adaptation to changes in the workplace, or the exercise of discretionary
22 decision-making authority. These restrictions are based upon the report of Dr.
23 Parker, the [Disability Determination Services] consulting psychologist who
24 examined the claimant on February 14, 2009 (Exhibit 8F). The undersigned
25 specifically notes that Dr. Parker also commented that the claimant “would
26 likely not be able to sustain accurate repetitive tasks at this point as she [sic]
emotionally fragile.” However, Dr. Parker’s comments to this affect are
entitled to only modest weight. His comments reflect the fact that the
claimant’s husband had died unexpectedly just one week prior to the exam.
She was experiencing an intense grief reaction at that time which eventually
ameliorated. When she testified at the hearing, the claimant acknowledged
that she has ultimately successfully coped with her husband’s death and that
she had begun to move forward with her life. Dr. Parker’s comments at the
time of his assessment are therefore entitled [to] only minimal weight since
they do not fairly represent the claimant’s long-term level of psychological
adjustment. While the claimant certainly has some ongoing anxiety and
depression, she remains capable of competitive work activity within the
context of the psychological limitations imposed in this case.

1 AR 17-18.

2
3 Plaintiff argues that in stating Dr. Parker's comments regarding the unlikelihood that she
4 would be able to sustain accurate repetitive tasks at this point was not fairly representative of her
5 long-term level of psychological adjustment, the ALJ employed the "wrong standard" in
6 determining if this assessed inability to perform repetitive tasks met defendant's 12-month
7 durational requirement for establishing disability. ECR #11, pp. 4. As plaintiff notes, 20 C.F.R.
8 § 404.1520(a)(4)(ii) states:

9 At the second step [of the sequential disability evaluation process]^[1], we
10 consider the medical severity of your impairment(s). If you do not have a
11 severe medically determinable physical or mental impairment that meets the
12 duration requirement in [20 C.F.R.] § 404.1509^[2], or a combination of
13 impairments that is severe and meets the duration requirement [in 20 C.F.R. §
14 404.1509], we will find that you are not disabled. . . .

15 She argues that in couching his rejection of Dr. Parker's opinion within the context of her "long-
16 term level of psychological adjustment," the ALJ failed to apply the proper standard for finding
17 whether her assessed repetitive task limitation lasted the requisite 12 months. At the same time
18 the ALJ, plaintiff asserts, implicitly found such to be the case by determining her depression and
19 anxiety to be severe impairments at step two. See AR 12.

20 But the mere fact that the ALJ found plaintiff to have severe mental impairments at step
21 two, does not mean that he found they met the 12-month duration requirement for establishing

22 ¹ Defendant employs a five-step "sequential evaluation process" to determine whether a claimant is disabled. See 20
23 C.F.R. § 404.1520, § 416.920. If the claimant is found disabled or not disabled at any particular step thereof, the
24 disability determination is made at that step, and the sequential evaluation process ends. See id. At step two of the
25 evaluation process, the ALJ must determine if an impairment is "severe." 20 C.F.R. § 404.1520, § 416.920. An
26 impairment is "not severe" if it does not "significantly limit" a claimant's mental or physical abilities to do basic
work activities. 20 C.F.R. § 404.1520(a)(4)(iii), (c), § 416.920(a)(4)(iii), (c); see also Social Security Ruling
("SSR") 96-3p, 1996 WL 374181 *1.

² Pursuant to 20 C.F.R. § 404.1509, "[u]nless [the claimant's] impairment is expected to result in death, it must have
lasted or must be expected to last for a continuous period of at least 12 months," otherwise known as "the duration
requirement."

1 disability. A step two severity finding, furthermore, does not at all necessarily imply a finding
2 that the duration requirement has been met. Indeed, 20 C.F.R. § 404.1520 clearly states that to
3 be found disabled, a claimant's medically determinable impairments or combination thereof not
4 only must be "severe" but also must meet the duration requirement. See id. ("If you do not have
5 a severe . . . impairment *that* meets the duration requirement in [20 C.F.R.] § 404.1509, or a
6 combination of impairments that is severe *and* meets the duration requirement [in 20 C.F.R. §
7 404.1509], we will find that you are not disabled.") (emphasis added).
8

9 That is, it is not enough to have a severe impairment, it also must be at least 12 months in
10 duration. In addition, as pointed out by defendant, not only must the impairment itself last or be
11 expected to last for 12 months, but those work-related limitations stemming therefrom alleged to
12 be disabling also must last for the requisite time period. See Barnhart v. Walton, 535 U.S. 212,
13 217-222 (2002) (upholding defendant's interpretation of Social Security Act's definition of
14 "disability" as requiring that both medically determinable impairment *and* resulting inability to
15 engage in substantial gainful activity must last for "not less than 12 months"); Carmickle v.
16 Commissioner Soc. Sec. Admin., 533 F.3d 1155, 1165 (9th Cir. 2008) (upholding decision by
17 ALJ to give physician's opinion regarding inability to tolerate sedentary or light work "little
18 weight" in assessing claimant's "long-term functioning" in light of that physician's decision two
19 months later to release claimant to full-time work).
20

21 In this case, as the ALJ noted, plaintiff's husband died just a week before she was
22 evaluated by Dr. Parker. See AR 307. In his evaluation report, Dr. Parker opined in relevant part
23 that:
24

25 She has lapses of concentration and would likely not be able to sustain
26 accurate repetitive tasks at this point in time and she is emotionally fragile.

. . . The claimant is in the midst of a major life crisis right now. Before the

1 death of her husband her functioning had not been very good as a result of
2 depression, anxiety, and also physical problems. With her reduction in her
3 Effexor to stretch the supply, she will likely get worse. With proper support
her prognosis would be average.

4 AR 309. Plaintiff argues Dr. Parker's statement that she will likely get worse with the reduction
5 in her medication, indicates her assessed mental functional limitations would last longer than the
6 12-month duration requirement. But as noted by the ALJ, at the hearing – which was held on
7 January 4, 2010, *less* than 12 months after Dr. Parker gave his opinion – plaintiff testified that
8 she was able to successfully cope with her husband's death and move on with her life. See AR
9 18, 43-44.

10
11 Plaintiff further argues that Dr. Parker's statement that her functioning had "not been
12 very good" before her husband died, also indicates her assessed inability to work may have
13 extended back to her alleged onset date of disability, and thus satisfied the duration requirement.
14 Dr. Parker clearly stated, however, that plaintiff would be unable to perform accurate repetitive
15 tasks "at this point in time" – that is, after the death of her husband. In other words, while he did
16 state that plaintiff's functioning had not been very good prior to her husband's death, Dr. Parker
17 elaborated no further on that statement, and certainly gave no indication that plaintiff would not
18 be able to perform such tasks during that prior period. Further, even if Dr. Parker's statements
19 may not be entirely conclusive on this issue, the ALJ's interpretation thereof here is reasonable,
20 and thus will not be overturned.³

21
22 Plaintiff next argues the ALJ improperly rejected the opinion of Thomas Clifford, Ph.D.,
23 a non-examining, consultative psychologist, who – after summarizing Dr. Parker's findings and
24

25 ³ The ALJ is responsible for determining credibility and resolving ambiguities and conflicts in the medical evidence.
26 See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998). Where the medical evidence in the record is not
conclusive, "questions of credibility and resolution of conflicts" are solely the functions of the ALJ. Sample v.
Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." Morgan v.
Commissioner of the Social Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999).

1 opinion – found in relevant part as follows in the mental residual functional capacity assessment
 2 (“MRFCA”) form he completed March 2, 2009:

3 . . . Despite the [claimant’s] symptoms currently, by 9/09 she retains the
 4 ability to :

5 . . . Understand, remember and carry out simple instructions. [The claimant]
 6 might have some difficulty persisting through a normal work week/day but
 should be able to do so.

7 . . . [The claimant] is able to work w/ a sup[ervisor], a few coworkers[,] but
 8 would do best with limited public contact.

9 . . . [The claimant] would do best w/ a predictable routine.

10 AR 319. Specifically, plaintiff argues the ALJ erred in rejecting Dr. Clifford’s opinion as to her
 11 ability to understand, remember and carry out simple instructions prior to September 2009. But
 12 Dr. Clifford did not provide any opinion as to plaintiff’s ability to do so prior to September 2009,
 13 that the ALJ was required to adopt. That is, the only mental limitations Dr. Clifford assessed that
 14 the ALJ was required to consider are those set forth above, which Dr. Clifford expressly found to
 15 apply to the period subsequent thereto.⁴ Given that Dr. Clifford relied on Dr. Parker’s evaluation
 16 report in forming his opinion, and that as discussed above the ALJ did not err in interpreting that
 17 report and findings contained therein, here too the undersigned finds no error in the way the ALJ
 18 treated Dr. Clifford’s opinion. Nor is that opinion inconsistent with the RFC with which the ALJ
 19 assessed plaintiff.
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 21

22 ⁴ Dr. Clifford’s narrative assessment is contained in Section III (“FUNCTIONAL CAPACITY ASSESSMENT”) of
 23 the MRFCA form he completed. See AR 319. He did check boxes in Section I (“SUMMARY CONCLUSIONS”) of that form indicating the presences of some more specific moderate mental functional limitations – although it
 24 should be noted that he found plaintiff to be not significantly limited in the ability to understand, remember and
 25 carry out very short and simple instructions (see AR 317-18) – but pursuant to the directive contained in defendant’s
 26 Program Operations Manual System (“POMS”), “[i]t is the narrative written by the psychiatrist or psychologist in
 [S]ection III . . . that adjudicators are to use as the assessment of [the claimant’s residual functional capacity
 (“RFC”).” POMS DI 25020.010B.1, <https://secure.ssa.gov/apps10/poms.nsf/lnx/0425020010> (emphasis in
 original). Although it is true that the POMS “does not have the force of law,” the Ninth Circuit has recognized it as
 being “persuasive authority.” Warre v. Commissioner of Social Sec. Admin., 439 F.3d 1001, 1005 (9th Cir. 2006).
 Nor are there any valid reasons for not following that directive in this case.

CONCLUSION

Based on the foregoing discussion and plaintiff's failure to show the ALJ committed any error in evaluating the above medical evidence, the undersigned recommends the Court find the ALJ properly concluded plaintiff was not disabled. Accordingly, the undersigned recommends as well that the Court affirm defendant's decision.

Pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 72(b), the parties shall have **fourteen (14) days** from service of this Report and Recommendation to file written objections thereto. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the clerk is directed set this matter for consideration on **August 31, 2012**, as noted in the caption.

DATED this 10th day of August, 2012.


Karen L. Strombom
United States Magistrate Judge